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In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

564.54 ACRES OF LAND, MORE OR LESS, SITUATED IN MONROE AND PIKE COUNTIES, COMMONWEALTH OF PENNSYVANIA, AND BENEDICT F. PASTORINI, ET AL., SOUTHEASTERN PENNSYLVANIA SYNOD OF THE LUTHERAN CHURCH IN AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

WADE H. McCREE, Jr.
Solicitor General
Department of Justice
Washington, D.C. 20530

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1. Respondent seeks to recast the principles of eminent domain law established by this Court. Recognizing that many decisions of the Court have held that consequential or incidental damages are not part of the constitutionally required measure of just compensation, respondent claims that this case is rare and different—"[a] situation such as this arises infrequently" (Br. 17). What is unusual, respondent says, is that to deny respondent an award

measured by the cost of substitute facilities "would produce a tremendous disparity between what the property owner would receive and what the property owner needs to approximately preserve the use to which the property was devoted" (Br. 16–17). Respondent's claim is that, regardless of the value of its condemned camps, just compensation requires that it receive an award sufficient to enable it to continue its camping program at another site.[1]

Respondent's concept of just compensation is at odds with the settled principles of eminent domain law. As we explained in our opening brief (at 22–30), the fundamental rule limits just compensation to the monetary value of the property taken, excluding incidental or consequential losses suffered by the owner. "One principle from which [this Court] has not deviated is that just compensation 'is for the

[1] This case is said to be special because "the property's chief value is in its use—not its status in the marketplace" (Br. 16). But it is not at all uncommon that a property suffices for its owner's use, and may even be uniquely valuable to the owner for that use, and yet its market value on condemnation falls far short of enabling the owner to purchase a new property equally suitable, or suitable at all, for carrying on that use. This may be true, for example, of an old factory long used by a firm and adapted to its special needs; of a family's home that is large but old and deteriorating; or of any structure which—like respondent's camps—has been exempt from regulatory requirements with which a new structure would have to comply. It was true in *Mitchell* v. *United States*, 267 U.S. 341 (1925), where the condemnees were "unable to reestablish themselves elsewhere in their former business" of growing and canning a special grade and quality of corn (*id.* at 343); nevertheless, they were not entitled to compensation for the destruction of their business as distinguished from the taking of their land (*id.* at 345).

property, and not to the owner.' " *United States* v. *Bodcaw Co.*, No. 78–551 (Feb. 26, 1979) (per curiam), slip op. 1 (quoting *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 326 (1893)). As the Court explained in *United States* v. *General Motors Corp.*, 323 U.S. 373, 382 (1945):

> When [the government] takes the property, that is the fee, the lease, whatever he may own, terminating altogether his interest, under established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of "consequential damage" as that conception has been defined in such cases. Even so the consequences are often harsh. For these whatever remedy may exist lies with Congress.

That is also the holding of *Mitchell* v. *United States*, 267 U.S. 341 (1925), which respondent attempts to discount as "*sui generis*" (Br. 15 n. 9)—notwithstanding that it has been repeatedly cited and followed by this Court. See, *e.g.*, *United States* v. *Bodcaw Co.*, No. 78–551 (Feb. 26, 1979), slip op. 2; *United States* v. *Grand River Dam Authority*, 363 U.S. 229, 236 (1960); *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 12, 22 (1949); *United States* v. *Petty Motor Co.*, 327 U.S., 372, 377–378 (1946); *United States ex rel. TVA* v. *Powelson*, 319 U.S. 266, 281 (1943).

The decisions from which respondent seeks to draw support (Br. 15) do not, in fact, deviate from the rule that just compensation is required only for the

value of the condemned property, not the condemnee's other losses. *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470 (1973), does not hold, as respondent claims (Br. 15), that "possible profits from [a] potential lease renewal" are compensable. *Almota* holds that the improvements which the condemnee made on the leased premises should be valued "in place over their useful life—taking into account the possibility that the lease might be renewed, as well as the possibility that it might not," because that would be the price "a willing buyer would have paid for the improvements." 409 U.S. at 474. The Court emphasized that the award was for the value of these improvements, not for "business losses," stating (409 U.S. at 475–476 n. 2):

> Almota may well be unable to operate a grain elevator business elsewhere; it may well lose the profits and other values of a going business, but it seeks compensation for none of that. *Mitchell* v. *United States*, 267 U.S. 371, did hold that the government was not obliged to pay for business losses caused by condemnation.
> * * * *

And in *Monongahela Navigation Co.* v. *United States, supra*, 148 U.S. at 312, the Court did not hold, as respondent claims (Br. 15), that "loss of profits due to destruction of [a] business" was compensable. The Court held that the value of the condemned property—a lock and dam on the Monongahela River—was to be determined, like the value of any other property, by

assessing "its productiveness—the profits which it brings to the owner." 148 U.S. at 328. Since the lock and dam were located on a busy commercial waterway, and the profits from the tolls collected were substantial, that profitability enhanced the value of the property, in the same way that rich soil for farming or a good commercial location enhances the value of other property. 148 U.S. at 328–329.

Respondent also relies (Br. 15) on the decision of the court of appeals in *United States* v. *1,380.09 Acres of Land*, 574 F. 2d 238, 241 (5th Cir. 1978), and quotes the court's statement that "[i]n determining just compensation in condemnation cases, our central concern is to do justice." In that decision the court of appeals affirmed an award of compensation to the condemnee for the expenses of securing appraisals of its land "to demonstrate the unfairness of the price offered by the United States," on the ground that otherwise the condemnee would not have been "made whole for the Government's taking of its land" (574 F. 2d at 241). That decision has now been summarily reversed by this Court. *United States* v. *Bodcaw Co.*, No. 78–551 (Feb. 26, 1979). The Court held (slip op. 2) that "indirect costs to the property owner caused by the taking of his land are generally not part of the just compensation to which he is constitutionally entitled."[2]

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[2] The other decisions of this Court that respondent cites (Br. 15), *Kimball Laundry Co.* v. *United States*, 338 U.S. 1 (1949), and *United States* v. *General Motors Corp.*, *supra*, are inapposite

In sum, respondent's claim for an award based on the amount necessary to reestablish its camping operations in new facilities—rather than on the value of the condemned property—is outside the scope of the just compensation that the Constitution requires. As this Court commented in *United States* v. *Bodcaw, supra,* slip op. 2–3: "Perhaps it would be fair or efficient to compensate a landowner for all the costs he incurs as a result of a condemnation action. * * * But such compensation is a matter of legislative grace rather than constitutional command." [3]

2. Respondent argues (Br. 17–29) that the substitute facilities measure of compensation should be extended to private condemnees when they are not-for-

because they involved the special circumstances of the temporary taking of property. See our opening brief at 27 n. 9. As the Court explained in *Kimball Laundry, supra,* 338 U.S. at 15 (footnote omitted), moving expenses and going concern value may be compensable in the case of a temporary taking because "[t]he temporary interruption as opposed to the final severance of occupancy so greatly narrows the range of alternatives open to the condemnee that it substantially increases the condemnor's obligation to him. It is a difference in degree wide enough to require a difference in result. Compare *United States* v. *General Motors Corp.*, 323 U.S. 373, with *United States* v. *Petty Motor Co.*, 327 U.S. 372."

[3] It may be that respondent, in contending that the chief value of the condemned property is in its use (see note 1, *supra*), means only that the property's value is enhanced by the fact that it is well adapted for use as a camp. We have no quarrel with that proposition. See, *e.g.*, *Mitchell* v. *United States*, *supra*, 267 U.S. at 344–345. At the trial there was extensive evidence of the sales prices of other, comparable camps (Tr. 263–264, 269–276), and the jury's award of fair market value no doubt reflected—in accordance with the closing argument of respondent's counsel (Tr. 932)—the special value of the property due to its adaptability for camp use.

profit entities. But, as we explained in our opening brief (at 33–47), the substitute facilities doctrine was developed by the lower courts to meet the unique needs of public condemnees, and the decisions applying the doctrine provide neither reason nor authority for extending it to privately owned property.

Respondent questions (Br. 7) why just compensation for government condemnees should entail a different measure of compensation than is required for private condemnees. While this Court has never endorsed the substitute facilities doctrine even for public condemnees,[4] the rationale for the doctrine as applied to governmental entities has been twofold: (1) In many cases the test of fair market value is inherently unworkable because the condemned facilities (streets, highways, bridges) are never bought and sold in the open market (see our opening brief at 34–35 and authorities cited); and (2) even when a market value could arguably be established for the condemned facility (as in the case of schools and other public buildings), the doctrine is applied because—and only if—the public entity is under an obligation to replace the facility (see *id.* at 35–38 and authorities cited). When the condemnee is thus required to replace the facility, the cost of doing so can reasonably be considered, not incidental or consequential, but a loss resulting directly and cer-

[4] Respondent errs (Br. 17–18) in claiming that *Brown* v. *United States*, 263 U.S. 78 (1923), was such an endorsement. See our opening brief at 34 n. 17.

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tainly from the condemnation.[5] Moreover, a public entity, unlike a private one (including not-for-profit organizations), may own and operate its property only for the benefit of the community it serves. Thus, even if the substitute facility should someday be sold—as respondent acknowledges is possible (Br. 28–29)—or diverted to a different use, the proceeds or the new use will necessarily benefit the public as a whole, and cannot provide a windfall for non-public interests. See Comment, *"Substitute Facilities" Compensation for Private Condemnees: United States* v. *564.54 Acres of Land,* 92 Harv. L. Rev. 514, 521 (December 1978); see also our opening brief at 36–39, 46 and note 26.[6]

[5] As stated in *United States* v. *City of New York*, 168 F. 2d 387, 389–390 (2d Cir. 1948):

"When no substitute facilities are necessary, it follows that no compensation is allowed. The rationale is clear. If the municipality has not had to provide substitutes, then it has suffered no financial loss and hence is not entitled to substantial damages."

[6] Respondent asserts that in the case of a private nonprofit condemnee as well, "the proceeds * * * cannot be diverted from its non-profit purpose" (Br. 29), and respondent points out that its own monies may only be used, under Pennsylvania law, " 'for the purpose or purposes set forth in its articles' of incorporation" (*id.* at 25 n. 14). But respondent's articles of incorporation provide that " '[t]he purpose of the corporation is to promote the Christian religion according to the tenets of faith as set forth in the Laws of the Lutheran Church of America' " (Pet. App. 38a; A. 95). This is quite a different purpose from that of a governmental entity in this country; it is a different purpose from the one which, under both opinions of the court of appeals, justified application of the substitute facilities doctrine to the award of compensation for respondent's camps.

Respondent acknowledges that, in the case of public condemnees, the substitute facilities doctrine is applied only where the courts determine that "there is a need" for the substitute facilities (Br. 19). Yet respondent goes on (*id.* at 26–27) to reject, for a private condemnee such as itself, both the test of " 'reasonably necessary to the public welfare' " and the more relaxed test of "benefit to the community" that the court of appeals successively propounded in its effort to transplant the substitute facilities doctrine from public to private condemnees. Respondent now asserts (Br. 27) "that the 'community benefit' aspect means no more than its non-profit facility is fully used for public, charitable, religious or educational purposes, irrespective of the social value a third party observer might attribute to it." In thus reading out of the proposed subsitute facilities test, where private condemnees are concerned, all vestiges of the public need or public benefit concept, respondent has broken away from the doctrine applicable to public condemnees on which its test purports to be based. Respondent's new position emphasizes the lack of any foundation for applying the substitute facilities doctrine to private condemnees.

Contrary to respondent's claim (Br. 21–22), there is no precedent for applying the substitute facilities measure to a private condemnee. The cases respondent cites (*ibid.*) show no such application. In *United States* v. *Two Acres of Land,* 144 F. 2d 207, 209 (7th Cir. 1944), cert. granted, 324 U.S. 833, cert. dismissed, 324 U.S. 884 (1945), the court

of appeals held only that for "non-profit, religious or service properties, cost of replacement is regarded as cogent evidence of value although not in itself the only standard of compensation." The court explained (144 F. 2d at 209): "But people do not go about buying and selling country churches. Such buildings have no established market values." We have no objection to the practice of admitting evidence of cost of replacement as probative of the value of the condemned property where it is difficult to obtain evidence of comparable sales. Such "other means of measuring value may have relevance—but only, of course, as bearing on what a prospective purchaser would have paid." *United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402 (1949); see *United States* v. *Certain Interests in Property, Etc.*, 296 F. 2d 264, 270 (4th Cir. 1961). Here, of course, respondent does not seek to introduce evidence of the cost of substitute facilities as probative of the market value of the condemned property—a value that was determined by the jury to be $740,000.[7]

[7] The other cases respondent cites (Br. 21–22) are also inapposite. In *United States* v. *531.13 Acres of Land*, 366 F.2d 915 (4th Cir. 1966), cert. denied, 385 U.S. 1025 (1967), the court of appeals reversed the district court's decision (244 F. Supp. 895 (W.D.S.C. 1965)), awarding compensation for the cost of constructing a new waste disposal system to the owner of a factory whose flowage rights in a river were taken. The court of appeals did not consider the proper measure of compensation because it held that there had been no taking. 366 F. 2d at 920.

In *United States* v. *43.635 Acres of Land*, 183 F. Supp. 168 (W.D. Mo. 1960), the United States negotiated a settlement with a power company, the N. W. Electric Power Cooperative, Inc., to permit the relocation of a transmission line from land on which the power company held a right-of-way easement. The United States then condemned an easement overlapping the area of the company's original easement. The only question before the court was the value of the company's interest. The portion of the decision that respondent apparently relies on, 183 F. Supp. at 170, is a dictum concerning what the measure of compensation would have been if the company had not settled its claim. The opinion does not indicate to what extent the power company had public service obligations that would place it under a legal duty, like a governmental entity, to replace the facility taken.

(In taking facilities held by utility companies, railroads and the like, the government frequently agrees to relocate such facilities as the most cost-effective means of settling condemnation cases. The Corps of Engineers has statutory authority to relocate highways, easements and rights-of-way taken for dam and reservoir or flood control projects. 33 U.S.C. 701c–1. See also *Seneca Nation of Indians* v. *United States*, 338 F.2d 55, 56 (2d Cir. 1964).)

3. Respondent attempts to minimize the financial consequences of extending the substitute facilities measure of compensation, as a constitutional requirement, to the condemnation of privately owned property. But those consequences would be substantial. Upholding the decision of the court of appeals would lead to inflated awards against federal, state, and local governments in a broad expanse of cases, and would produce windfalls for condemnees.

Respondent urges that "[a] situation such as this arises infrequently" (Br. 17). But in fact, as we have already noted (see note 1, *supra*), it is far from unusual for the owner of facilities which are not new, and which may not meet present regulatory requirements, but which suffice for the owner's needs, to have difficulty in obtaining an equally suitable new site for

no more than the market value of the condemned property. Moreover, respondent now argues (Br. 27) that the substitute facilities measure should be applied whenever there is a taking of not-for-profit property devoted to some "public, charitable, religious or educational purpose," as long as the owner, exercising reasonable diligence, cannot purchase a "functionally equivalent" replacement at a cost roughly equal to the fair market value of the condemned property. In respondent's present view, no other showing of being "'reasonably necessary to the public welfare'" or "'community benefit'" should be required (Br. 26–27). This standard, which is even broader than the court of appeals' decision, would be widely applicable and would permit a high proportion of nonprofit condemnees, if not all of them, to claim substitute facilities compensation.

The substitute facilities measure would give the private condemnee an award substantially exceeding the value of the condemned property. In this case, for example, where the jury found the fair market value to be $740,000, respondent has claimed that the cost of substitute facilities will be in excess of 4 or 5 million dollars (Pet. App. 78a–79a; A. 154; Br. 5). Respondent now attempts (Br. 28) to discount this problem by conceding that the new camp facilities constructed to replace those condemned "may result in maintenance and capital savings," which should be deducted from its award. Respondent does not say what it means by "maintenance and capital savings," and respondent in the trial court sought the full cost

of constructing the substitute facilities without any such deduction.[8] Whatever the meaning of respondent's concession, it is clear that the deductions now proposed would not reduce the award to fair market value, or, it appears, even to the cost of replacement decreased by the depreciation of the condemned property. To the extent that awards based on the cost of substitute facilities exceed the value of the condemned property, they constitute windfalls to the condemnee.

The windfall is enhanced by the fact, noted in our opening brief (at 46), that awarding a private condemnee the cost of substitute facilities does not ensure that the condemnee will in fact replace the condemned facility or will continue its operation indefinitely. Respondent now suggests (Br. 28) that the government could ensure replacement of the facility by paying the award out gradually over the course of the construction project. Among other

[8] As respondent states (Br. 5), its expert testified that the cost of building functionally equivalent facilities would be $4,361,633 (A. 154), an estimate he described as "conservative" (*ibid.*). The expert was not asked by respondent's counsel about any "maintenance and capital savings" or other amounts that should be deducted from the cost of building the facilities. In his closing argument to the jury, respondent's counsel relied on the expert's figures (Tr. 735–736) and asked the jury (Tr. 740) to "award to the Synod the cost of constructing substitute facilities which are the functional equivalent of the three river camps as of the date of condemnation, based on the testimony and the numbers supplied by [the expert]." He added (*ibid.*) that "anything less than that, will mean, according to the testimony of the witnesses that you have heard, that there will be a substantial cutback in this camping program that has been conducted over these years and this would be a catastrophe."

objections to such a procedure where a church is involved, at present there is no statutory authority under federal law for such a practice.[9] Moreover, the suggestion is inconsistent with respondent's position (Br. 27) that the use of property by a non-profit entity for any "public, charitable, religious or educational purpose" suffices to invoke the substitute facilities doctrine, without any showing of "reasonable necessity" or "community benefit" from the particular use. On this theory, it would make no difference whether respondent used its award to replace its camps or devoted the money instead to one of respondent's purely religious purposes.

In any event, as respondent implicitly concedes (Br. 28–29), even if it were possible to ensure that the condemnee would use its award to build substitute facilities, the condemnee would ultimately receive a windfall when it sold the new—and substantially more valuable—facilities. See Comment, *supra,* 92 Harv. L. Rev. at 521–522.

4. Respondent has now disavowed both of the positions taken by the court of appeals in seeking to apply

[9] The Declaration of Taking Act, ch. 307, 46 Stat. 1421, 40 U.S.C. 258a, requires the United States to deposit the estimated just compensation when it initiates a condemnation proceeding, in order to obtain immediate title to the property. See *United States* v. *Miller*, 317 U.S. 369, 381 (1943). The landowner is entitled to withdraw the government's deposit immediately, and is also entitled to interest, from the date of taking, on any deficiency caused by the entry of a judgment greater than the government's initial deposit. *United States* v. *0.45 Acre of Land in Town of Groton*, 151 F.2d 114, 115 (2d Cir. 1945).

the substitute facilities doctrine to private condemnees. The court first indicated, in its interlocutory opinion, that the condemned facility must be "reasonably necessary to public welfare" (Pet. App. 83a; see also *id.* at 20a–27a). In its second decision the court relaxed its test, requiring only that the facility "provide a benefit to the community that will not be as fully provided after the facility is taken" (Pet. App. 26a). But the standards adopted in the court's second decision are vague and unworkable, and as applied to a religious organization they are constitutionally offensive (see our main brief at 41–45, 47–53). Apparently recognizing the force of these objections, respondent now declines to defend even the weak "community benefit" standard of the decision below, and urges (Br. 27–28) that the substitute facilities measure should be made available to any non-profit condemnee, so long as its condemned property was devoted to some "public, charitable, religious or educational purpose."

Under respondent's new theory, many of respondent's factual claims in this case are irrelevant. It is irrelevant whether the condemned camps were, as respondent claims (Br. 3), operated for campers mainly of modest or underprivileged background, or whether the camping population was "racially and religiously mixed and was drawn from inner city, as well as rural, areas," or whether the devotional exercises and religious instruction at the camps occupied only "a small portion of each week." Under respondent's present theory, the substitute facilities doctrine

would be equally applicable if the camps were entirely religious in nature, charged fees that only the rich could afford, and were limited to Lutherans. Indeed, the doctrine would be equally applicable where what is condemned is not a camp but a facility whose purpose is exclusively "religious." The only real requirement, under this theory, is that the condemnee be a not-for-profit entity—a "non-profit property owner[ ]" (Br. 30).

Respondent's theory is thus much broader than that adopted even in the second opinion of the court of appeals. And while this theory may not raise the same difficulties of application that the court's position raises, it is at least equally objectionable. As we have already noted, its broad applicability would lead to substantially higher condemnation awards in a great many cases—potentially in every case involving a not-for-profit condemnee. And there is no legal support for this beneficence. The substitute facilities doctrine as applied to public condemnees provides no support, for it is based both on the requirement of replacing the facility and on the assurance that the benefit of the award will accrue to the public. There is no basis for assuming that simply because an entity operates on a not-for-profit basis—whether it is a church, a club, a fraternal organization, a trade association, or whatever—its interests are the same as the interests of the public.[10] Most important, there

[10] Dissenting from the decision below, Judge Rosenn criticized the majority's "community benefit" standard on the ground that it might include "private nonprofit swimming clubs, ice-skating clubs, tennis clubs, and myriads of other nonprofit recreational and social organizations who might discern a need for their facilities but which the community might find frivolous" (Pet. App. 54a n. 9). In reply, the majority relied on the role of the jury, assuming that "any facility a jury finds beneficial to the community or rationally related to public welfare would not be found 'frivolous' by the community" (*id.* at 25a n. 15). Under respondent's proposed standard, there is no such determination by the jury or anyone else, and all nonprofit organizations would automatically qualify.

is no basis—and respondent suggests none—for concluding that this is what the Constitution requires. Whatever the situation might be if Congress or a state legislature were to enact legislation providing for substitute-facilities compensation for all not-for-profit entities (cf. *Walz* v. *Tax Commission,* 397 U.S. 664 (1970)), there is nothing in the Constiution that requires the government to provide such a benefit to that group.

Indeed, there is nothing in the Constitution that would support limiting the beneficiaries, as respondent apparently would to not-for-profit entities. If respondent is correct, we do not understand why the substitute facilities measure of compensation should not also apply, by the same constitutional command, to the condemnation of profit-making facilities that the owner cannot replace for roughly the fair market value of the condemned property. The loss to the owner is the same in either case, and the public may benefit from profit-making facilities no less than from non-profit ones. Respondent has not answered the point, advanced by Judge Stern (Pet. App. 34a–35a) and by us (main brief at 43–44), that even under

the "community benefit" test adopted by the court of appeals, there is no rational basis for refusing to extend the substitute facilities doctrine to profit-making entities as well as nonprofit ones.[11] Under respondent's new test, dispensing with the "community benefit" criterion, the problem is at least equally grave, for it is difficult to find anything in the Constitution which requires the substitute facilities measure of compensation for non-profit entities and denies it to profit-making ones.[12]

In the end, the distinctions drawn by respondent and by the court of appeals must all be rejected. At least where private property is concerned, there is no justification for departing from the traditional limitation of just compensation to the monetary equivalent of the condemned property. The traditional definition

[11] Respondent suggests only that nonprofit property is like governmental property in being "held for the use of others—not the use of the property owner in whom title to the fee resides" (Br. 25). It is hard to see the sense in which a nonprofit social or religious organization, for example, holds its property "for the use of others" rather than for the use of its own members; at the same time, it is hard to see the sense in which the property of a legitimate theater or a profit-making camp is not held "for the use of others," while the property of a nonprofit theater group or a nonprofit camp is. The essential distinction between profit-making and nonprofit entities is in the presence or absence of the profit motive.

[12] When Congress, in the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.*, went beyond the constitutional requirements and provided for the payment of certain categories of consequential damages resulting from federal condemnations, it made these benefits available equally to profit-making and to nonprofit organizations. See our main brief at 29–30.

of just compensation reflects a carefully fixed balance between the interests of the public and those of the property owner. In the absence of legislative adjustments, that balance should be preserved.

CONCLUSION

For these reasons, as well as the reasons set forth in our main brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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